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SUPREME COURT, U.S.

No. 82-5100

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

Lois Gholston,

Appellant,

v.

Edward W. Martin, Jr., M.D., et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF OHIO

Motion in the Alternative to Dismiss or Affirm

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MOTION IN THE ALTERNATIVE TO DISMISS OR AFFIRM

May it please the Court:

Appellee moves that the appeal herein taken be dismissed on the ground that said appeal does not present a substantial federal question.

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QUESTION PRESENTED

Whether the Appellant has been denied any federal right of due process or equal protection, where her medical malpractice claim against the Appellee was held to be barred because she neglected to sue within one year after the termination of her physician-patient relationship with the Appellee, and thus failed to comply with Ohio's statute of limitations for medical claims (Ohio Rev. Code Ann. Section 2305.11 (Page 1981), as interpreted by the Supreme Court of Ohio).

OPINIONS BELOW

The opinions below are adequately referred to in the Appellant's Jurisdictional Statement, and copies of the opinions are attached thereto.

JURISDICTION

The grounds upon which this Court's jurisdiction is invoked are set forth in the Appellant's Jurisdictional Statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent Constitutional and statutory provisions are set forth in the Appellant's Jurisdictional Statement.

STATEMENT OF THE CASE

Ohio's statute of limitations for medical malpractice claims requires that a medical malpractice plaintiff bring suit within one year after accrual of the cause of action. See Ohio Rev. Code Ann. Section 2305.11(A) (Page 1981). By judicial decision, a cause of action for medical malpractice accrues, at the latest, when the physician-patient relationship terminates. See Wyler v. Tripi, 25 Ohio St.2d 164, 267 N.E.2d 419 (syllabus) (1971). Also by judicial decision, in cases where the physician's negligence involves merely the leaving of a foreign object in the patient's body, the statute of limitations is tolled until the patient discovers or reasonably should have discovered the negligent act. See Melnyk v. Cleveland Clinic, 32 Ohio St.2d 198, 201, 290 N.E.2d 916, 918 (1972).

The precise date on which the physician-patient relationship terminated here is not settled. But even by Appellant's account, she failed to bring suit until two-and-one-half years had elapsed

after the termination of the Appellee's professional relationship with her -- well beyond the one-year period provided to her by statute. Appellant's claim arose from an extended simple mastectomy that occurred on September 28, 1977. After the Appellee had diagnosed that she was suffering from breast cancer and discussed with her the laboratory findings that provided the basis of his diagnosis, he performed the operation. The post-operative period was uneventful. It is undisputed that Appellant did have carcinoma of the breast.

Several years later, another doctor allegedly told Appellant that her entire breast need not have been removed. After another eleven months, she filed this suit. Her claim has been rejected on three separate instances by the courts of Ohio, because the statute of limitations has run with respect to her claim.

ARGUMENT

I. OHIO REVISED CODE SECTION 2305.11 AND ITS FOREIGN OBJECT EXCEPTION ARE REASONABLE AND THUS DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Within the past twelve years, this Court has twice declined to hear equal protection challenges to medical malpractice statutes of limitations. See Woodward v. Burnham City Hospital, 449 U.S. 807 (1980), dismissing appeal from Anderson v. Wagner, 79 Ill.2d 295, 402 N.E.2d 560 (1979); Clark v. Gulesian, 400 U.S. 993 (1971), denying cert. to 429 F.2d 405 (1st Cir. 1970). The challenged distinction in both cases was that between medical malpractice plaintiffs as a group and all other tort plaintiffs, to whom longer limitations periods were available.[1] Appellant here, however, attacks the distinction in Ohio law between foreign object plaintiffs and other medical malpractice plaintiffs for purposes of determining when the cause of action accrues.

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[1] A number of other recent cases have involved equal protection challenges, after the plaintiff's claim has been held to be time-barred, to medical malpractice statutes of limitations. No courts have struck down the statutes, however. See Botzet v. Spencer, 362 F.Supp. 177 (D. Minn. 1973) (claim based on contract and arising out of an operation for plaintiff's

As noted in the Statement of the Case, the cause of action in a medical malpractice claim in Ohio accrues for a foreign object plaintiff at the time of discovery (or when the foreign object reasonably should have been discovered). For all other medical malpractice plaintiffs, however, the cause of action accrues at the termination of the physician-patient relationship. In either situation, suit must be filed within four years after the date of the negligent act or omission giving rise to the claim. See Ohio Rev. Code Ann. §2305.11(B) (Page 1981). Appellant does not challenge this four-year limit.

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varicose veins; court rejected equal protection challenge to distinction between medical contract cases and other contract cases with respect to limitations period); Stephens v. Snyder Clinic Association, 230 Kan. 115, ____, 631 P.2d 222, 234 (1981) (claim based on negligent insertion of IUD; court rejected equal protection challenge to distinction between medical malpractice and other tort claims, with respect to limitations period); Mishek v. Stanton, 616 P.2d 135, 139 (Colo. 1980) (claim based on negligent administration of medication during childbirth; court rejected equal protection challenge to distinction between malpracticing medical professionals and other tortfeasors, with respect to limitations period); Johnson v. St. Vincent Hospital, 404 N.E.2d 585, 603 (Ind. 1980) (consolidated cases involving claims arising out of tonsillectomy, hysterectomy, eye treatment, and general hospital treatment; court rejected equal protection challenge to distinction between medical malpractice and other tort plaintiffs, with respect to accrual date and tolling provisions); Hamby v. Neurological Associates, 243 Ga. 698, 256 S.E.2d 378 (1979) (medical malpractice claim for loss of consortium; court rejected equal protection challenge to distinction between medical malpractice and other tort claims, with respect to limitations period); Sellers v. Edwards, 289 Ala. 2, 6, 265 So.2d 438, 440-41 (1972) (claim based on a bulldog-clamp left in plaintiff's body; court rejected equal protection challenge to distinction between malpracticing medical professionals and other tortfeasors, with respect to limitations period); Laughlin v. Forgrave, 432 S.W.2d 308, 314-15 (Mo. 1968) (claim based on rubber dam left in back; court rejected equal protection challenge to distinction between medical malpractice and other tort plaintiffs, with respect to limitations period); Roberts v. Durham County Hospital, ____ N.C. App. ____, ____, 289 S.E.2d 875, 878-79 (N.C. Ct. App. 1982) (claim based on intravenous catheter pieces left in plaintiff's arm; court rejected equal protection challenge to distinction between malpracticing medical professionals and other tortfeasors, with respect to limitations period); Duffy v. King Chiropractic Clinic, 17 Wash. App. 693, 696-97, 565 P.2d 435, 437 (Wash. Ct. App. 1977) (undetailed medical malpractice claim; court rejected equal protection challenge to distinction between malpracticing health-care providers and other tortfeasors); Landgraff v. Wagner, 26 Ariz. App. 49, 55, 546 P.2d 26, 31-32 (Ariz. Ct. App. 1976), appeal dismissed, 429 U.S. 806 (1976), (claim based on surgical clamp left in plaintiff's abdomen; court rejected equal protection challenge to distinction between health-care providers and other tortfeasors, with respect to limitations period) (appeal dismissed for want of jurisdiction).

The proper test for determining the validity of distinctions drawn by statutes of limitations, when challenged on equal protection grounds, is whether the distinctions are reasonable. See, e.g., Johnson v. St. Vincent Hospital, 404 N.E.2d 585, 600 (Ind. 1980); Ross v. Kansas City General Hospital, 608 S.W.2d 397, 399 (Mo. 1980); Roberts v. Durham County Hospital, ____ N.C. App. ____, ____, 389 S.E.2d 875, 878-79 (rejecting strict scrutiny).

The Ohio Supreme Court has ably enumerated several reasons for applying the discovery rule in foreign-object cases: the absence of the typical "stale claims" problems of proof that accompany other medical malpractice claims, see Melnyk v. Cleveland Clinic, Inc., supra, at 200 n.5, 290 N.E.2d at 917 n.5; and the "pressures associated with modern surgeon-patient relationships," Melnyk, supra, at 202, 290 N.E.2d at 918. After balancing the policy considerations involved, the Ohio Supreme Court announced in Melnyk that the cause of action in foreign object cases accrues from the date of discovery, rather than the date of termination of the physician-patient relationship that applies to other medical malpractice claims. Melnyk, supra, at 201, 290 N.E.2d at 918.

Recent case law uniformly upholds foreign object exceptions such as that challenged here against equal protection attacks. The decisions also uphold statutes of limitations that treat medical malpractice plaintiffs in general differently from other tort plaintiffs.

In 1980, for example, the Missouri Supreme Court sustained, against a federal equal protection challenge, distinctions identical to those that Appellant complains about here. Ross v. Kansas City General Hospital, supra, at 399. The plaintiff in Ross suffered an allegedly negligently performed tubal ligation, which negligence resulted in her subsequent pregnancy. The Missouri courts held that her claim was barred by Missouri's statute of limitations for medical malpractice claims. The plaintiff attacked the Missouri statute on the ground that, inter alia, the distinctions that the statute drew between different

types of medical malpractice claimants violated the federal equal protection clause. She contended that it was unreasonable for the accrual date for foreign object claims to be the date of discovery, while for other medical malpractice claims such as the plaintiff's, the claim accrued from the date of the negligent act or omission. See Ross, supra, at 398.

The Missouri Supreme Court applied the rational basis test to her argument. It then imputed two reasons behind the distinction to the Missouri legislature: first, a special unfairness in barring foreign object plaintiffs; and second, fewer problems with stale evidence in foreign object cases. See Ross, supra, at 399. The court then unanimously held that the distinction did not violate Fourteenth Amendment equal protection guarantees.

The reasoning in Ross is sound. It leads directly to the appropriate conclusion here: Ohio's foreign object exception is reasonable, and thus withstands Appellant's equal protection objections.

II. THE ACCRUAL DATE AND ONE-YEAR PERIOD FOR BRINGING MEDICAL MALPRACTICE SUITS, AS ESTABLISHED IN SECTION 2305.11, IS A REASONABLE POLICY DECISION, BALANCING OHIO'S INTEREST IN DISCOURAGING STALE CLAIMS AND PROMOTING QUALITY HEALTH CARE WITH PLAINTIFFS' INTEREST IN RECOVERING DAMAGES FOR INJURIES NEGLIGENTLY INFLICTED UPON THEM, AND THUS DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

This Court has twice declined over the past twelve years to hear due process challenges to medical malpractice statutes of limitations. See Woodward, supra p.2; Clark, supra p.2. In Woodward, the challenged provision of the statute placed a limit of four years from the date of the negligent act or omission on medical malpractice claims. See Anderson v. Wagner, 79 Ill.2d 295, 312, 402 N.E.2d 560,568 (1980), appeal dismissed sub nom. Woodward v. Burnham City Hospital, 449 U.S. 807 (1980). In Clark, the period was even shorter: two years from the date of the negligent act or omission. See Clark v. Gulesian, 429 F.2d 405, 406 (1st Cir. 1970), cert. denied, 400 U.S. 993 (1971).

Statutes such as that upheld in Clark may operate more harshly upon medical malpractice plaintiffs than Ohio's

limitation scheme, even though the period in Clark was two years while the period in Ohio is one year. This potential for greater harshness is due to the difference in accrual dates: under statutes such as that in Clark, the cause of action accrues from the date of the negligent act or omission, whereas in Ohio the cause of action may accrue -- as it did in Appellant's situation -- as late as the termination of the physician-patient relationship. So long as the relationship terminates more than one year after the negligent act, the plaintiff under Ohio law will have had a total of more than two years from the date of the negligent act during which to discover the malpractice, versus only two years under statutes such as that in Clark. Thus, in Clark this Court declined to hear a challenge to a medical malpractice statute of limitations that often operates more harshly than the Ohio statute. The Court should likewise decline to hear Appellant's challenge here.

Although Ohio's statute of limitations may in some cases operate harshly by precluding the claims of plaintiffs who did not discover -- and reasonably could not have discovered -- their injury before the statute has run, it does not therefore deny due process. For example, in Anderson v. Wagner, supra p.5, one of the plaintiffs underwent amputation on both legs and also developed cataracts, due to massive steroid treatments that he received after an erroneous tissue diagnosis. See Anderson, at 300, 402 N.E.2d at 562. After the statute had run, a new diagnosis performed on tissue preserved from the first test showed that the earlier diagnosis was incorrect. The court recognized that:

> Although such a result - a cause of action barred before its discovery - seems harsh and unfair, the reasonableness of the statute must be judged in light of the circumstances confronting the legislature and the end which it sought to accomplish. Id. at 312, 402 N.E.2d at 568.

The court went on to find no violation of plaintiff's right to due process.

The facts were equally compelling in Clark, supra p.2. The plaintiff had suffered intestinal problems and general ill

health for eighteen years, due to a towel left in his abdominal cavity. The towel had been left there during an operation that the defendant had performed. A unanimous First Circuit panel, speaking through then-Chief Judge Aldrich, observed that:

> Unfortunate as the present result may be for the plaintiff, the state may reasonably recognize that a defendant has an interest in repose, and in the avoidance of stale claims, however free from fault the claimant's delay may be. Clark, supra, at 406.

The court proceeded to uphold the statute.

A number of other courts have likewise held that, while a medical malpractice statute of limitations may preclude some plaintiffs from recovering damages before they reasonably can discover that they have a claim, the statute does not therefore violate federal due process guarantees.[2] Indeed, there is no good case law holding medical malpractice statutes of limitations unconstitutional on due process grounds.[3]

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[2] See, e.g., Stephens, supra n.1, at ____, 631 P.2d at 236 (four-year statute, accruing from date of negligent act/omission, barred claim based on an IUD becoming buried in plaintiff's uterine wall; the IUD was not discovered until a hysterectomy was required after the statute had run); Owen v. Wilson, 260 Ark. 21, 25, 537 S.W.2d 543, 545 (1976) (two-year statute, accruing from date of negligent act/omission, barred claim based on surgical instrument left in plaintiff's body; the instrument was not discovered until after the statute had run); Laughlin, supra n.1, at 314 (two-year statute, accruing from date of negligent act/omission, barred claim based on rubber dam left in plaintiff's back; the rubber dam was not discovered until after the statute had run, even though the plaintiff had seen seven different doctors to treat her back pains); Carmichael v. Silbert, 422 N.E.2d 1330, 1333 (Ind. App. 1981) (two year statute, accruing from date of negligent act/omission, barred malpractice claim; plaintiff discovered the negligence within the period, but the court analyzed the due process challenge recognizing that the statute could bar some claims before plaintiffs knew about the negligence causing their injury); Landgraff v. Wagner, 26 Ariz. App. 49, 54-55, 546 P.2d 26, 31-32 (Ariz. Ct. App. 1976), appeal dismissed, 429 U.S. 806 (1976) (six-year statute, accruing from date of negligent act/omission, barred claim based on a six-inch surgical clamp left in plaintiff's body; the clamp was not discovered until after the statute had run) (appeal dismissed for lack of jurisdiction).

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[3] In addition to the two cases discussed in the text and the five cases cited in note 2, courts in several other cases have addressed federal due process challenges to medical malpractice statutes of limitation; in every case, the court rejected the challenge. See Mishek, supra n.1, at 138; Johnson, supra n.1, at 603-04; Ross, supra p.4, at 400.

Statutes of limitations are by nature arbitrary and thus occasionally harsh. But as this Court noted in Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945), establishing statutes of limitations is a valid exercise of legislative prerogative, based on public policy considerations:

> Statutes of limitation find their justification in necessity and convenience rather than in logic.... They have come into the law not through the judicial process but through legislation. They represent a public policy decision about the privilege to litigate. Chase Securities Corp. v. Donaldson, supra, at 314.

Ohio's one-year statute and its accrual upon the termination of the physician-patient relationship represents a legislative decision resolving competing policy considerations. On the one hand is the policy of giving patients who are negligently injured by health-care providers a fair opportunity to recover their damages; on the other hand is the policy of discouraging stale claims, with their attendant problems of absence of witnesses, failure of memory, and so forth. See Wyler v. Tripi, 25 Ohio St.2d 160, 166, 267 N.E.2d 419, 420 (1971). The Ohio Supreme Court, in refusing to adopt a discovery rule for the accrual of medical malpractice causes of action, recognized that the Ohio legislature has manifested its preference for the termination rule -- and the policy decisions it embodies -- over the discovery rule. Wyler v. Tripi, supra, at 170-72, 267 N.E.2d at 423-24. The court thus properly deferred to the legislative judgment in this pragmatic, policy-laden area.

The Ohio legislature itself has more recently articulated another important policy consideration behind the state's statute of limitations for medical malpractice claims: assuring an adequate supply of good health care to Ohio's citizens. In leaving the termination rule for accrual undisturbed and imposing upon all medical malpractice claims a four-year limit from the date of the negligent act or omission, the Legislature declared that "immediate action is necessary to ensure a continuance of health care delivery to the citizens of Ohio." Am. Sub. H.B. No. 682, 1975-76 Ohio Laws 2809, 2843-44. Assuring good health care

to the public has been explicitly recognized as a basis for special medical malpractice statutes of limitations by a number of courts around the nation as well as by the Ohio Legislature. See, e.g., Anderson, supra p.5, at 301-09, 402 N.E.2d at 562-66 (extended discussion of the "malpractice crisis" and legislative responses to it).

Thus, Ohio's statute of limitations for medical malpractice claims represents a reasonable legislative decision resolving a variety of competing policy considerations. One year from the termination of the physician-patient relationship offers medical malpractice plaintiffs as a group a fair opportunity to litigate, at the same time that it discourages stale claims and promotes the quality of health care for the people of Ohio.

CONCLUSION

As demonstated in the foregoing argument, Ohio's medical malpractice statute of limitations, Ohio Rev. Code Ann. §2305.11, does not violate either the equal protection or the due process clause of the Fourteenth Amendment of the United States Constitution. Appellant's position has been frequently propounded and uniformly held to be without merit. Appellant's contentions present no substantial federal question, and Appellee's motion to dismiss the appeal should therefore be sustained.

Respectfully submitted,

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PROOF OF SERVICE

This is to certify that a copy of the foregoing Motion in the Alternative to Dismiss or Affirm was served upon John E. Duda, Attorney for Appellant, at 800 Bond Court Building, Cleveland, Ohio 44114; and to Thomas P. Michael, at 17 South High Street, Columbus, Ohio 43215, by regular U.S. Mail, postage prepaid, this 24th day of August, 1982.

James S. Monahan

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